United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-7247

United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants, et al.,

Plaintiffs-Appellees,

v.

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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Statement of the Issue

Are employees of an air carrier when sued individually in actions governed by the Warsaw Convention entitled to the protection of the treaty's limitations of liability or is that protection only for the benefit of their employers?

Statement of the Case

This action arises out of the crash of a Trans World Airlines, Inc. (T.W.A.) 707 jet aircraft, designated as Flight 841, into the high seas approximately 50 nautical miles west of Cephalonia, Greece, on September 8, 1974 (A7 ¶ 3).* All 79 passengers and 9 crew members aboard the aircraft died in the accident. Plaintiffs allege that a bomb or other explosive device was permitted to be placed or carried aboard the aircraft and that it exploded shortly after taking off from Athens, Greece, causing the loss of control of the aircraft and its crash into the Ionian Sea (A7 ¶ 6). The flight originated in Tel Aviv, Israel; its ultimate destination, after planned stops at Athens, Greece and Rome, Italy, was New York City.

T.W.A. is not named as a defendant in this action. Instead, plaintiffs sued Forwood Cloud Wiser, Jr. (Wiser), the then President of T.W.A., and Richard E. Neuman (Neuman), Staff Vice-President of Audit and Security of T.W.A. (A7 ¶¶ 4, 5).

Prior Proceedings

This action was originally commenced in the United States District Court for the District of New Jersey. It was thereafter transferred to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404(a) (A1). Wrongful death damages are sought by the personal representatives of the estates of the several decedents. Jurisdiction of the District Court is under 46 U.S.C. § 761 *et seq.*, commonly known as the Death on the High Seas Act; jurisdiction is also alleged under 28 U.S.C. §§ 1332, 1333 and the general maritime law (A7).

Plaintiffs allege that the President (Wiser) and Vice-President (Neuman) of T.W.A. were responsible for the

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* References are to pages of the Joint Appendix.

institution, operation and maintenance of a security system sufficient to prevent explosive devices from being carried or placed on board the aircraft (A7). They claim that because of their "negligent failure to do so" a bomb or other explosive device was placed or carried on board the aircraft and that this device exploded shortly after the aircraft had taken off from Athens, Greece, thereby causing the aircraft to crash into the Ionian Sea and the deaths of all aboard (A7-8; A32 ¶ 6).

Defendants' Answer admitted jurisdiction under 46 U.S.C. § 761, *et seq.*, that defendants Wiser and Neuman were the President and Vice-President respectively of T.W.A. at the time of the accident and generally denied all other material allegations in the complaint including defendants' negligence (A18-19). In addition, defendants pleaded in their Second Affirmative Defense that the decedents' transportation and travel were governed by the provisions of the Warsaw Convention,* as amended by the Montreal Agreement,** and that their liability, if any, was

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* 49 Stat. 3000 *et seq.* The Warsaw Convention is officially entitled "Convention For The Unification Of Certain Rules Relating To International Transportation By Air". It was signed by the representatives of 23 nations at Warsaw, Poland, October 12, 1929. Over 100 countries now adhere to it. While the United States did not participate in the Conference, the United States Senate, on June 15, 1934, advised adherence to the Convention, and on June 27, 1934 President Roosevelt proclaimed adherence which, under Article 38, took effect on October 29, 1934. 49 Stat. 3000-3026, p. 3013 (1935). The text of the Warsaw Convention (hereinafter referred to as the Treaty or Convention) is reproduced in the Addendum to this brief in accordance with F.R. App. P. 28(f).

** Agreement Relating To Liability Limitations Of The Warsaw Convention And The Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 13, 1966 (Docket 17325). This Agreement had the general effect of increasing the Treaty's limits to $75,000. See, *Husserl* v. *Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702, n.1 at 703 (SD NY 1972). For a detailed discussion of the events leading up to the Montreal Agreement see, Lowen-

(*footnote continued on following page*)

limited to a maximum of $75,000 for the death of each passenger (A26-28).

On January 26, 1976, the Judicial Panel on Multidistrict Litigation transferred the instant suit and all other pending federal court litigation arising out of this accident to the Honorable Marvin E. Frankel, U.S.D.J. of the Southern District of New York pursuant to 28 U.S.C. § 1407, *In re Air Crash In The Ionian Sea,* 407 F.Supp. 238 (J.P.M.L. 1976).

The Proceedings Below

Plaintiffs' Position

On September 24, 1975, plaintiffs moved under F.R.Civ.P. 12(f) to strike defendants' Second Affirmative Treaty Defense (A29). Plaintiffs' attack was twofold: First, they argued that because an employee of a corporation was not immune for his own negligent acts at common law the defendants were liable to them in the full amount of their provable damages (A32, ¶ 7). They further contended that the Warsaw Convention, as a Treaty, must be strictly construed because it is in derogation of the common law (A34, ¶¶ 15, 16) and that because Article 22(1) of the Treaty, which allows the limitation on damages, refers to the "carrier" and makes no mention of the carrier's employees, the limitation was not available to the carriers' employees (A32, ¶ 9). In other words the plaintiffs argued below that although the Treaty limitation is a valid defense to a suit against the air carrier corporation its employees are not entitled to the same protection, i.e., the corporate

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(*footnote continued from preceding page*)

feld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 546 (1967) (Mr. Lowenfeld was chairman of the United States Delegation to the Montreal Conference in 1966). The text of the Montreal Agreement is reproduced in the Addendum to this brief.

shell is protected by the Treaty but not the employees through which it functions. Second, plaintiffs argued tangentially and at some length that the amount of the limitation is neither fair nor justifiable (A243-251).

Defendants' Position

Defendants' basic position was and is that the Treaty should be interpreted in a manner which would effectuate its purposes and give it a meaning consistent with the objectives sought to be accomplished by the delegates and consistent with their genuine shared expectations. It was the explicit policy expressed in the Treaty which governed and not any contrary policy founded in the common law. The Treaty should not be interpreted in a literal manner, nor should it be "strictly" construed. Moreover, the question of the fairness or desirability of the limitation is a matter to be answered solely by the political body which bears the constitutional responsibility to make such judgments, and which is best equipped to do so—the Executive Branch of the United States Government.

The Opinion Below

The lower Court's opinion by Judge Marvin E. Frankel is not yet officially reported. A copy appears in the Appendix at A286. Reviewing the extensive documents presented to him Judge Frankel conceded that the question was "by no means susceptible of a clear and entirely confident answer" (A288). He then acknowledged that there was no indication in the Treaty of deliberate attention to the question and concluded that the silence of the Treaty resulted in uncertainty as to its resolution (A288). Noting that there was "no unequivocal message from the language and history" of the Treaty the lower court then proceeded to consider the questions of policy (A289).

Judge Frankel viewed the Treaty's policy of limiting liability as a policy designed solely to protect *infant* air

carriers from potentially fatal burdens of compensation to victims of aircraft accidents. He noted, however, and not insignificantly, that this *original policy* has lost a great deal of its *persuasive* force because "air travel is no longer an infant industry" (A289). Opposed to the policy of the Treaty was, in the lower court's view, a stronger national policy against common carriers stipulating without congressional authority against their own negligence or that of their agents or servants (A289). On the basis of these "conflicting" policies alone, Judge Frankel favored the latter policy over the policy determined by the Executive and the Senate (A292). Having established his concept of what the national policy should be the court looked for further outside support for his anti-limitation stand. He found "a bit more" to support his view by the fact that Article 25A of the Hague Protocol (an amendment of the Treaty which the United States has not ratified) expressly provides that the limitation shall be available to the servants or agents in actions against them (A292). While acknowledging that "it may be said [Art 25A] merely affirmed the pre-existing position" of the drafters the court held that a *slightly* stronger point was that the "careful" treaty drafters* added in Hague what was omitted in Warsaw.

Shortly after his decision Judge Frankel certified the question for an interlocutory appeal to this Court under 28 U.S.C. § 1292(b) by Memorandum-Order dated April 21, 1976 (A302). Upon defendants' petition, this Court granted leave to appeal pursuant to that statute (A303).

It is submitted that if Judge Frankel's restrictive view of this ongoing Treaty is upheld, it will have consequences which can, and undoubtedly will, have adverse effects in several areas of domestic and international relations which

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* Also referred to as "harried draftsmen" by Judge Tyler in *Husserl* v. *Swiss Air Transport Company, Ltd.*, 388 F.Supp. 1238, 1250 (SDNY 1975).

vitally concern this nation. Some of these consequences appear quite readily, others less so; some are yet to appear. Those readily discernible can be summarized as follows:

a) The Treaty will no longer provide member nations with its primary objective of a *uniform* regulation of the air carrier liability.

b) The main objective of the Treaty can be easily avoided by the simple expedient of suing the employee alleged to have been negligent on the assumption that the airline will pay any judgment recovered against its employee.

c) Because many air carriers do not provide third-party indemnity protection clauses in union contracts with their employees, these employees are now exposed to judgments which could total in the millions of dollars while the liability of their own employers (based on the negligent acts of these same employees) would be limited to the amount in the Treaty.

d) Unnecessary difficulties and problems will be undoubtedly encountered by the President and the Department of State in their diplomatic relations and negotiations with the over 100 foreign nations who are parties to this and other similar treaties. The resolution of the question by a single judge (who conceded its uncertainty) nullifying the primary purpose and effect of this Treaty can only lead to frictions which will make the present and future conduct of these relations and negotiations much more difficult for the Executive Branch of the Government. For example, how is the State Department to respond to those nations when asked why an international agreement vitally concerned with international air transportation, negotiated in good faith and approved by the President and the Senate, is suddenly and without notice rendered inoperative, not because it was denounced according to its own provisions or that it was held unconstitutional by our highest court, but

merely because one word was interpreted in a manner which failed to give effect to the Treaty's expressed purpose? Obtaining unanimous international agreement in dealing with the aircraft hi-jacking problem is but one current area of legitimate concern. These nations may well be justified in now concluding that in entering into treaty negotiations with the United States pertaining to important matters of mutual concern our President will need more than the "advice and consent" of the Senate to assure that our part of the bargain will be honored. Needless to say the Executive should not be so hampered nor placed in this embarrassing position in these delicate dealings with foreign nations because of an admittedly uncertain decision of one judge based upon unarticulated notions of what this country's national policy is or should be.

It is submitted that Judge Frankel's decision is based upon nothing more than his mere literal reading of the Treaty and his mistaken assumption that a common law policy against common carriers' limiting their liability takes precedence over the expressed national policy contained in a Treaty with over 100 foreign nations. For the reasons set forth below defendants contend that the lower court was in error in so holding and should be reversed.*

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* Defendants wish to emphasize at the outset that the only issue on this appeal is whether they, *as employees* of the airline are entitled to the benefit of the limitation provisions of the Treaty. The appeal does not involve the broader and different question of whether non-employee *agents* of the carrier are also so entitled. Such agents may be other and entirely separate corporate entities acting on behalf of the carrier on a separate contractual basis for a specific period of time, a relationship quite different from that present in the within action. See, e.g., *Chutter* v. *K.L.M. and Allied Aviation Service International, Corp.*, 132 F.Supp. 611, 616 (SDNY 1955); *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959); H. Drion, *Limitation of Liabilities in International Air Law*, 156, 158-159 (1954).

ARGUMENT

POINT I

In its determination of the issue before it the Court below failed to liberally interpret the Treaty's language so as to effectuate its purposes and to give it a meaning consistent with the genuine shared expectations of the contracting parties. Instead, the Court improperly resolved the issue by a literal and mechanical application of its terms.

The purpose of the Warsaw Convention was twofold. First, because aviation would link many lands with different legal systems, uniformity was desired. This purpose is acknowledged in its official title (Add. 1). The second purpose was to limit the potential liability of the air carrier in case of accident. This latter purpose was clearly recognized to be the more important one. See the remarks of A. Giannini, head of the Italian delegation and president of the commission which prepared the draft presented to the Warsaw Conference.* See, also, Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 499 (1967).

The preamble of the Treaty clearly articulates that its purpose is to regulate "in a uniform manner the *conditions* of international transportation by air in respect of . . . the liability of the carrier." (Emphasis added; Add. 1, 2.) One means chosen to effectuate that purpose was to limit the carrier's liability, *Husserl* v. *Swiss Air Transport, Co., Ltd.*, 388 F.Supp. 1238, 1252 (SDNY 1975). In *Eck* v. *United Arab Airlines,* 15 N.Y.2d 53, 59 (1964), the New York Court of Appeals observed that:

> "The over-all principle of the Convention was one of allowing only a regulated burden to be the responsi-

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* Minutes, *Second International Conference on Private Aeronautical Law, October 4-12,* Warsaw (R. Horner & D. Legrez English translation 1975) 205 (hereinafter *Warsaw Minutes*).

> bility of the then struggling carriers. The purposes were to *provide uniform rules of limitation concerning the liability* of international carriers to their passengers and to *provide a uniform remedy for these passengers* to the extent that this remedy would not burden the carrier more than the Convention provisions allowed." 255 N.Y.S.2d at 252 [Emphasis by Court]

Ten years later, in *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 395-396 (1974), the same Court said that in construing the Treaty:

> ". . . we look to the purposes of the Convention and the ordinary meaning of its terms and seek to apply the 'fundamental principle' that *a treaty should receive a liberal interpretation to give effect to its apparent purposes* . . . [citations omitted].
>
> The apparent purpose of the entire Convention is uniformity among its diverse adherent Nations—the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered. The particular provisions limiting liability were designed to assure that only a regulated burden be borne by the air carriers . . . and to afford a more definite basis for passenger recovery . . . *These liability provisions should, we believe, be interpreted to promote uniformity both of the substance and application of the Convention.*"* [Emphasis added.]

The Convention's provisions relating to liability are found in Chapter III, Articles 17 through 30 (Add. 10-15). Article 17 imposes the liability:

> "Art. 17. The carrier shall be liable for damage sus-

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* With the ever-expanding list of new nations it is clear that the need for uniformity is greater today than it was in 1929 when 23 nations signed the Convention. As of December 31, 1974, over 110 nations have ratified or adhered to this Treaty. See, *Aeronautical Statutes and Related Materials*, 509-512 (Civil Aeronautics Board, 1974).

> tained in the event of the death or wounding of a passenger . . ."

Article 22 limits the liability:

> "Art. 22(1). In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of . . ."*

Admittedly the term "carrier" is not defined in the Treaty. In Articles 20 and 25(2) references are made to "agents" of the carrier. However, these references fail to assist in the resolution of the issue because they are merely limited in scope to the considerations of additional factors bearing on the carrier's *liability,* i.e., the acts of its agents will be considered. However the lack of definition is far from the "compelling argument" Judge Frankel believed it to be (A288).

With one exception the Minutes of the Warsaw Conference are silent on the question. The one exception involved an attempt by the Brazilian delegation to include a definition of "carrier" in the Convention *because the laws of the different countries were not uniform on the subject.* This delegate pointed out that under such laws the owner, operator, contracting carrier and charterer of the aircraft differed in legal status and argued that the matter should be considered because the draft presented by Professor Ambrosini, who was the author of the draft convention on the liability of an "owner" and "operator" of the aircraft to third parties, did not employ the term

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* The Convention's limit is approximately $10,000 (A227), This was increased to $75,000 by the *Montreal Agreement* (Add. 22). The *Guatemala City Protocol of 1971,* a proposed amendment to the Treaty, increases these limits to $100,000 in Art. VIII (Add. 25). At the present time, the Civil Aeronautics Board is considering a Supplemental Compensation Plan, which would increase the limits to approximately $320,000, in accordance with Art. XIV (Art. 35A) of the *Guatemala Protocol.* See, Docket 28713 Agreement CAB.

"carrier". Mr. Giannini, president of the commission, concluded that "in this case it was not necessary to define the carrier . . . [and] we have referred his proposal to the C.I.T.E.J.A.* to take under consideration." *Warsaw Minutes,* 143-144; *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, n. 43, and accompanying text at 340-341 (5th Cir. 1967) cert. den. 392 U.S. 905. As Judge Wisdom pointed out in *Block* the Conference did not give its reason for rejecting the Brazilian proposal. However, he observed that:

> "The delegates may have decided (so De Vos [the Reporter] thought) that it was better to leave the definition of 'carrier' for the courts to work out in accordance with the general law of the forum." 386 F. 2d at 341.

Whatever the reason, it is clear that the Brazilian proposal was not concerned with any question relating to whether the carrier's employees were to be included in the proposed definition. Judge Wisdom's discussion also makes it clear that the proposal was concerned only with the question of which entity other than the contracting carrier, e.g., the owner or charterer of the aircraft, could be held responsible in case of accident. The liability of one other than the contracting carrier is now the subject of the *Guadalajara Convention* (1961), 500 U.N.T.S. 31; see, also, Lowenfeld, *Aviation Law,* Documents Supplement, 460 (1972).

Case history is equally meager and non-informative. The only reported case which directly faced this issue is *Pierre* v. *Eastern Airlines, Inc. and Cecil Foxworth,* 152 F.Supp. 486 (D.N.J. 1957). In that case plaintiff sued to recover damages for injuries sustained when the aircraft crashed on take-off from Idlewild Airport, New York City. In addition to naming Eastern as a defendant, plaintiff

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* The International Technical Committee of Aerial Legal Experts. For a history of this Committee, see, Ide, *The History and Accomplishments of C.I.T.E.J.A.,* 3 J.Air. L. & Com 27 (1932).

also sued Foxworth, the pilot of the aircraft. Plaintiff moved to strike the Warsaw defense pleaded by both Eastern and Foxworth on the grounds that, as to Eastern the Convention's limitation violated her constitutional right to a jury trial on any damages in excess of the limitation; and as to Foxworth on the ground that the limitation in Article 22(1) did not apply to the airline's pilot-employee. Judge Meany denied the motion as to Eastern holding that at common law there was no right to a jury on the question of plaintiff's damages.* However, Judge Meany granted plaintiff's motion to dismiss the pilot's defense saying (at 489):

> "As for the case against the defendant Foxworth the situation is different. The Warsaw Convention at the time of the accident (1953) applied to the carrier only. Various efforts had been made to amend the terms of the Convention to include the servants and agents of the carrier in the provision of limitation of liability, but to no avail. Not until 1955 was the limitation so extended in Article 25 A of the Convention. Therefore the general practice and rules prevalent in the trial of negligence cases unaffected by the terms of the Warsaw Convention, will control the trial of the plaintiff against the defendant Foxworth."

Pierre was not appealed. Rather it was settled for a nominal amount.

Pierre is based simply on a literal reading of the Treaty without any discussion or thought as to its meaning or purpose. Its blunt approach is the same as Judge Frankel's—if it was put in Hague then it wasn't in Warsaw. It is submitted that *Pierre* is wrong and repre-

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* In *Smyth Sales* v. *Petroleum Heat & Power Co.*, 141 F.2d 41 (3rd Cir. 1944), the Court of Appeals held (p. 44) that the guarantee of the Seventh Amendment extends to the award of damages, "since at common law the amount of damages was for the jury." The appeal in *Smyth* was from a decision of Judge Meany.

sents no authority that this Court must or should follow. The only other decision on this issue is in *Stratton* v. *Trans Canada Air Lines,* 27 D.L.R. 2d 670, 674 (British Columbia Supreme Court 1961), *a non-Warsaw case* in which the Court, in dicta, merely said that the Act (Carriage by Air Act, R.S.C. 1952, c. 45 which ratified the Warsaw Convention on behalf of Canada) protects the carriers only and that there was nothing in the Act "that even remotely suggests that the word 'carrier' to be interpreted as including employees of the carriers." The Court cited *Pierre* in support. On appeal, the Court of Appeals affirmed the lower court holding that the action was not governed by the Convention; but it held that since there was no cause of action against the pilot's estate under the Act, the issue of the limitation was academic. 32 D.L.R. 736 (British Columbia Ct. App. 1962).

Opposed to these decisions are those in *Wanderer* v. *Sabena and Pan American Airways, Inc.,* 1949 U.S. Aviation Reports 25 (Sup. Ct. N.Y. County 1949); and *Chutter* v. *KLM Royal Dutch Airlines,* 132 F.Supp. 611, 613 (SD NY 1955), in which Judge Edelstein pointed out that "it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity." *Wanderer* and *Chutter* involved non-employee agents of the carrier. In *Froman* v. *Pan American Airways, Inc.,* 1953 U.S. Aviation Reports 1, 5 (Sup.Ct. N.Y. County 1953), Justice Steuer charged the jury that ". . . included in the definition of the defendant [carrier] is that of any officer or employee of the defendant." In *Schloss* v. *Matteucci,* 260 F.2d 16 (10th Cir. 1958), plaintiff's decedent died in an airplane accident in New Mexico. In seeking to avoid the $10,000 limit which the owner of a public conveyance was required to pay under New Mexico law, the plaintiff sued the estate of the deceased pilot. In denying recovery against the pilot's estate the Court of Appeals pointed out that the pilot, as the common carrier's employee, was protected by the limitation and that the recovery of the statutory limit was exclusive of all other liability.

Concluding that there was no clear message from either the language or history of the Treaty, Judge Frankel then considered the qu[illegible]n of policy. Contentions as to the proper interpretation of treaties were met with a judicial shrug (A291). Although disclaiming any heavy reliance upon "canons" the court proceeded to explode one anyway. When the smoke of literalness dispersed the crux of the lower court's decision was revealed:

> "The limitations for agents and employees would have been easy enough to specify. It was not stated." (A291)

In short, the court relied strictly on a literal reading of the treaty—i.e., since *only* the "carrier" was mentioned in Article 22(1) the intent was to exclude their employees.

In rejecting a prior attempt to interpret the Convention in a literal sense, this Court said in *Lisi* v. *Alitalia-Linee Aeree Italiane S.p.A.*, 370 F.2d 508, 511-512 (2d Cir. 1966):

> "It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a 'verbal prison'. Sullivan v. Behimer, 363 U.S. 335, 358 . . . (1960) (Frankfurter, J., dissenting). The task of ascertaining the meaning of words is difficult, and *one certain way of misinterpreting them is by a literal reading.* As Learned Hand put it, 'words are such tempermental beings that the surest way to lose their essence [is] to take them at their face.' . . . Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles *and the overall purposes of the Convention.*" (Emphasis added.)

In *Eck* v. *United Arab Airlines*, 360 F.2d 804 (2d Cir. 1966), this Court passed on the question of whether the

plaintiff could properly maintain her action in New York under the third "place" in Article 28(1) of the Convention (where the airline has a place of business *through which* the contract was made). Miss Eck purchased her ticket in California from Scandanavian Airlines System. SAS confirmed the reservation through United Arab Airlines' principal office in Cairo, Egypt, instead of *through* UAA's New York City office. The district court dismissed the action holding that to allow the suit in New York "would read a meaning into the treaty not originally intended." 241 F.Supp. at 808. This Court disagreed. It said (360 F.2d at 812):

> "The problem of interpretation posed by this case should not have been resolved by a mechanical application of the third provision's language and the easy assertion that a contrary result would conflict with unarticulated notions about the original intent of the Convention's framers. A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires interpretation. . . . Other considerations, such as the court's sense of conditions that existed when the language of the provision was adopted, its awareness of the mischief the provision was meant to remedy, and the legislative history available to it, are also relevant as the court attempts to discern and articulate the provision's purpose."

The Court then noted that if it concluded that the provision's language accurately reflects its purpose, then a literal interpretation would be proper. However, the Court added:

> "Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose. . . ." at 812

The Court recognized that when the words were first chosen they may have accurately reflected the provision's

purpose but that those same words today may only imperfectly reflect that purpose because of changed conditions in the area to which the words refer. The Court then said:

> "It would be inconsistent with the 'wise counsel to reject "the tyranny of literalness" ' Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966), if the court in the latter situations did not seek to interpret the provision so as to effectuate its purpose, *even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion.*" at 812 [Emphasis added.]

In *Eck* the defendant's position was that since Miss Eck did not obtain her ticket *through* the New York office she could not maintain her action in the district court embracing that New York office. This was clearly a literal reading of the Treaty's provisions, as the New York Court of Appeals thought in the same case, *Eck* v. *United Arab Airlines*, 15 N.Y.2d 53 (1964). In that case the Court said (15 N.Y. 2d at 58-59):

> "The crux of the problem is that the Appellate Division reached its conclusion by applying mechanically the *literal* translation of a phrase without an analysis of the treaty." [Emphasis by Court.]

In rejecting the Appellate Division's literal approach the Court observed that "the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination." 15 N.Y.2d at 59. Similarly, in *Block* v. *Compagnie Nationale Air France, supra,* plaintiffs' counsel argued that charter flights are not subject to the Warsaw Convention because the Convention does not expressly mention charter flights. The Court rejected this literal approach. Quoting Hyde. *International Law Chiefly as Interpreted and Applied by*

the United States, 1481 (Rev. ed. 1945), the Fifth Circuit said:

> " 'In its long experience as an interpreter of treaties the Supreme Court has maintained a record singularly free from the manifestation of a sense of obligation to exclude or ignore the probative value of evidence at variance with what the form of a text would appear to entail.' M. Hyde 1481. The Supreme Court itself has said: 'Of course treaties are constructed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " [citations omitted] 386 F.2d at 337.

In *Factor* v. *Laubenheimer,* 290 U.S. 276, 293-294 (1933), the Supreme Court said:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."

In *Geofroy* v. *Riggs,* 133 U.S. 258, 270 (1889), the Court said:

> "It is a rule, in construing treaties as well as laws, to give a *sensible meaning* to all their provisions if that be practicable. 'The interpretation, therefore',

> says Vattel, *'which would render a treaty null and inefficient cannot be admitted'*, and again, 'it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory'. Vattel. Book II, c 17." [Emphasis added.]

The words of the statute or other document are to be taken according to their natural meaning, *Mason* v. *United States,* 260 U.S. 545, 554 (1922), and specific words of a treaty should be given "a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov* v. *United States,* 299 F.2d 565, 568 (2d Cir. 1962) aff'd 373 U.S. 49 (1963); *Day* v. *Trans World Airlines, Inc.,* 528 F.2d 31, 35 (2d Cir. 1975).

Judge Frankel's narrow and restrictive view of "carrier" renders this Treaty "null and inefficient" because he failed to take into account what that term imports. Carriers in the Convention's sense are airline companies; specifically they are corporations. A corporation is, of course, an artificial person composed of natural persons. It is a fictitious, artificial, legal or juristic entity created by proper judicial authority, Timberg, *Corporate Fiction, Logical, Social and International Implications,* 46 Colum. L. Rev. 533 (1946). Although it is a new legal entity entirely separate from its members, it can act only through its duly constituted organs, primarily its board of directors. R. Stevens, *Handbook on the Law of Private Corporations,* § 1 (2d ed. 1949). A corporation is itself a form of limited liability.

Most of today's major scheduled airlines, domestic and foreign, are corporations which commenced their corporate lives well before the Warsaw Convention was adopted in 1929. For example, the *World Airline Record,* 468 (Seventh ed. 1972) informs us that:

> "The early history of United Air Lines is the story of the Nation's pioneer coast-to-coast mail route that

was opened in 1920. It is also the story of fast-moving events in the world of *corporate* finance later that same decade."* [Emphasis added.]

Today practically all scheduled air carriers are organized and operate under a corporate form.**

Since a corporation (air carrier) can act only through its officers, employees, pilots, etc. any negligence or conduct sufficient to impose liability on the carrier under the Convention must necessarily be the negligence or conduct of such officers, pilots or employees. It cannot be seriously doubted, therefore, that the framers of the Convention must have been aware that the "carriers" with which they were vitally concerned were organizations conducting their operations under a limited or corporate form. Given the purpose of the Convention to limit the carriers' liability, it would have been suicidal for any operator to engage in international air transportation without first obtaining the initial protection that the corporate form itself provided—limited liability. While, as indicated above, the Minutes of the Convention are silent on the question, it cannot be doubted that the delegates were aware that the carriers could only conduct their air operations through the efforts and acts of their servants and employees; Articles 20 and

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* That same publication shows that the corporate lives of the following airlines had their inceptions prior to 1929: American; Braniff; Delta; Eastern; Northwest; Pan American; T.W.A.; United; Western; Quantas; Sabena; Air France; K.L.M.; Aeroflot; and B.O.A.C. Other carriers, such as Continental, National and Northeast had their inceptions before the United States adhered to the Convention in 1934.

** See, e.g., Exhibit "K" (A227-229) for a list of such carriers. These carriers were directed by the C.A.B. to revise all their tariff liability limitations which may be applicable to international air transportation under the Convention (A227).

25(2) are sufficient indications of this awareness. Cf. Article 27.*

Huibert Drion, a delegate for the Netherlands at the International Conference on Private Air Law, The Hague, September, 1955, in discussing this subject in his book, H. Drion, *Limitation of Liabilities in International Air Law*, ¶ 136, p. 158 (1954) said:

> "As it is practically impossible to distinguish the carrier from the community of persons whose joint activity *is* the carrier's activity, as far as the principle of the carrier's liability is concerned, so is it illogical to make such a distinction for the purpose of the limitation of liability. If the carrier's liability is to be limited, the liability of the members of the carrier's enterprise should also be limited, for any negligence of the carrier is negligence of his employees. Any other solution would defeat the purpose of Article 24, which is to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage."

See, also ¶¶ 133-140, pages 152-156. Since views of the parties subsequent to ratification of a treaty may be considered in order to ascertain its proper construction, *Day* v. *Trans World Airlines, Inc., supra,* at 35-36, it will be

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* In the lower court plaintiffs' counsel argued with some humor that "private fliers" as well as corporate air carriers were also governed by the Warsaw Convention (A131-132), submitting certain selected pages from the World Aviation Directory in support of that belief (A143-149). Defendants' detailed reply to this contention, with which plaintiffs took no serious issue, is set forth at A218-219, ¶¶ 3 and 4. In view of the detailed and stringent requirements contained in the Federal Aviation Act, 49 U.S.C. §§ 1301, 1371 *et seq.* and the Regulations promulgated thereunder, 14 C.F.R. Part 221, with respect to air carrier definition and regulation, it would indeed be difficult to imagine, let alone believe, that Mrs. Brier (one of the "private fliers" A148) would be considered an air carrier engaged in international air transportation any more than the Elaine K. Ferguson Airline and Storm Door Company.

seen that many of the comments support the belief that the true purpose of Article 25A of the Hague Protocol (Add. 20) was to *clarify* the original intent of the delegates, i.e., that the limitation provisions protect the carriers' employees.

This position was perhaps best explained by Professor Ambrosini, a member of C.I.T.E.J.A. and the author of the draft convention submitted at the Warsaw Conference in 1929 (*Warsaw Minutes,* 144) on the liability of an "owner" and "operator" of aircraft for damage to third persons. Speaking at the Hague Convention, 1 *International Conference on Private Air Law, The Hague, September, 1955, Minutes,* 220 (ICAO Doc. 7686-LC/140 1956) (hereinafter *Hague Minutes*), his view was that:

> *"He had always thought* that the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents. and especially for the simple reason that, in his opinion, the carrier and his servants or agents were, from the legal point of view, the same person. But the pilots had always sought a provision in this Convention which would clearly define their own legal situation which was reasonable and appropriate." (Emphasis added.)

Some years later when consideration was given by the Guadalajara Convention delegates to Article V (which is similar to Art. 25A of *Hague*) [*Guadalajara Convention,* 1 *International Conference on Private Air Law, Guadalajara, August-September, 1961, Minutes,* 134 (ICAO Doc. 8301-LC/149-1 1962) (hereinafter *Guadalajara Minutes*)] Professor Ambrosini is reported as having said:

> "He recalled that the Association of Airline Pilots and private pilots had always sought to have this question of possible liability decided by a reasonable and definitive text. For this reason, the Assembly

had decided to refer to the Legal Committee and consideration of this question and the Hague Conference had approved the text which gave to servants and agents in general the right to avail themselves of a limitation of liability. As to the more general question whether the Warsaw Convention provided for the limitation of liability of the servants or agents, his opinion was that, under the general legislative and legal system, servants and agents, as the *longa manus* of their employer, would enjoy the same situation as the latter. From the legal point of view, there could not be a system whereby the carrier would be liable with limits and the servants and agents without limits. But since there were Representatives who had a contrary opinion, he considered it just and appropriate that at the time there should be drafted a provision according to which the servants and agents could enjoy the same right of invoking the limitation of liability. *He considered that this would be equivalent to interpreting the Warsaw Convention in an authentic manner, so as to avoid any doubt which there might be concerning the scope of the draft Convention in regard to servants and agents.* In this way, when the judge coordinated and interpreted this Convention and the Hague Protocol (where there was a concrete limitation) he would be inclined to decide that this principle applied *even in the case where the carriage was governed by the original Warsaw Convention.*" [Emphasis added.]

See, also, *Hague Minutes.* 215 (Mr. Garnault, France); 216 (Mr. Stalder, Switzerland):

> "Mr. Stalder stated that the Swiss Delegation saw no necessity for amending the Convention by an Article 25A. However, in order to assist the courts which would have to pass judgment on cases now carefully regulated by this Article, he was prepared to accept it." at 216.

218 (Mr. Golstein, Belgium); *Guadalajara Minutes,* 136-137 (Mr. Wilberforce, U.K.); 137 (Mr. Gazdik, IATA); 138 (Mr. Edwards, Australia):

> "There were many doubts concerning the situation of the servants and agents and consequently, it was appropriate that the position be clarified." at 138.

2 *Hague Documents,* 171 (ICAO Doc. 7686-LC/140, 1956); 2 *Guadalajara Documents,* 30 (¶ 29), 75 (¶ d) (ICAO Doc. 8301-LC/149-2); 1 *Conference on Private International Air Law, Rome, September-October, 1952* (ICAO Doc. 7379-LC/134) 70 (Mr. Wilberforce, U.K., Mr. Ambrosini, Italy); H. Drion, *supra,* 152-162; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. at 503, n. 25 and text, 504-505; K.M. Beaumont, *The Warsaw Convention of 1929, as Amended by the Protocol Signed at The Hague, on September 28, 1955,* 22 J. Air L. & Com., 414, 419 (1955) ("The new Article 25A sets to rest doubts on this subject . . .").

Appellants do not suggest that there were no differences of opinion on this question. Drion, *supra,* makes this clear, ¶ 136, p. 157; see, also, *Hague Minutes,* 214-223; (A 299 n. 18). Most of the *post*-Warsaw statements supporting plaintiffs' view can be attributable to the conceptual differences in the laws of the countries involved, see, *Block* v. *Air France, supra,* 386 F. 2d at 331; H. Drion, *supra,* ¶ 138, p. 159. An excellent illustration of this is found in the comments of Mr. Alten of Norway, *Hague Minutes,* 214 in which he stressed the *contractual nature* of the relation between the carrier and passenger. Since the servants of the carrier were not parties to the contract he felt the defense of the limitation was not available to them (A 54). This view is illustrative of the fact that the drafters, a majority of whom were from civil law countries, took into account the civil law notion of contract. See, *Rosman* v. *Trans World Airlines, Inc., supra,* 34 N.Y.2d at 394 n. 8; H. Drion, *supra,* pp. 32, 162; *Block* v. *Air*

France, supra, 386 F.2d at 331-334, wherein Judge Wisdom discusses the civil law concept of the contract of carriage. See, also, Lowenfeld, *Aviation Law,* § 1.5 (1972); cf. S. Mankabady, *Rights and Immunities of the Carrier's Servants or Agents,* 5 J. Maritime L. & Com. 111 (1973).

The abundance and divergence of *post*-Warsaw views on this subject may in itself assist to explain why there was a complete silence on the subject during the Warwsaw proceedings. On the one hand is the view of Professor Ambrosini, *supra,* and those in agreement with him, that he *had always thought* that the servant's liability was limited since from a legal standpoint the servant and employer were "the same person"—that the employees were the *"longa manus"* of their employer. This assumption is consistent with the theory that these corporate carriers can only act through their employees, and that it would be unthinkable to allow the corporate-carrier shell to limit its own liability but deny that limitation to the very corporate employee whose negligent act furnished the basis for that liability.

On the other hand, it is plausible that the Warsaw silence can be explained by civil law concepts of the contractual nature of the carrier's liability. Since the employee was not part of the contract of carriage between the passenger and carrier, the limitation would be denied to him. Stated differently, if the employee was not part of the contract of carriage, there could be no valid cause of action against him based upon that contract. *Thus, if the employee could not have been sued under the contract there would have been no necessity for the delegates to consider whether or not he was entitled to the limitation.*

In *Husserl* v. *Swiss Air Transport Co., Ltd.,* 388 F.Supp. 1238, 1246 (SD NY 1975), Judge Tyler concluded in a slightly different context that:

> ". . . the most plausible inference to be drawn for the Convention's silence . . . is that the drafters

> neglected to deal with a problem which they would have wished to resolve if they had been aware of it."

Strong evidence that the drafters were not "aware of it" is the fact that when they did become aware they acted as one by protecting the employee in all subsequent private air law conventions and protocol. See, *Rome Convention,* Article 9, 310 U.N.T.S. (1952); *Hague Protocol,* Art. XIV, 478 U.N.T.S. (1955) (Add. 20); *Guadalajara Convention,* Art. V, 500 U.N.T.S. 31 (1961); *Guatemala City Protocol,* Art. XI (1971) (Add. 26), A. Lowenfeld, *Aviation Law* Documents Suppl. 437. In view of such demonstrated unanimity is there any sound reason to suppose that the original Warsaw drafters would not have wished to resolve this question in the same manner? The fact that the drafters may have only imperfectly manifested their purpose of establishing a uniform limitation of liability does not preclude the Court from giving "the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov* v. *United States,* 299 F.2d 565, 568 (2d Cir. 1962), *aff'd* 373 U.S. 49 (1963); *Eck* v. *United Arab Airlines,* 360 F.2d 804, 812 (2d Cir. 1966); *Day* v. *Trans World Airlines, Inc., supra.* In *Cawley* v. *United States,* 272 F.2d 443, 445 (2d Cir. 1959), it was Judge Learned Hand who stated that when the Court applies legislative commands:

> "[w]e are to put ourselves so far as we can in the position of the legislature that uttered them, and decide whether or not it would declare that the situation that has arisen is within what it wished to cover."

The lower court's assertion that insertion of the limitation in favor of the employees "would have been easy enough to specify" (A291) assumes that the delegates considered the matter but rejected it. Such an assumption is much too easy. Furthermore it is unwarranted because it implies an intent on the part of the delegates

that they wished to plant the seed of the Treaty's own destruction. See, *Geofroy* v. *Riggs, supra,* 270. Moreover, such an assumption has the effect of frustrating the delegates' goal of providing not only a limited liability but also a durable and flexible system of air law. *Day* v. *Trans World Airlines, Inc., supra,* at 38.

The "literal meanings of words are [not] to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted", *Matter of Capone* v. *Weaver,* 6 N.Y.2d 307, 309 (1959), rather, "the spirit and purpose of the statue and the objectives sought to be accomplished by the legislature must be borne in mind." *Matter of New York Post Corp.* v. *Leibowitz,* 2 N.Y.2d 677, 685 (1957). Clearly a common sense approach to the interpretation of the Treaty by the lower court would have been entirely consistent with its purpose. As Justice Holmes observed: "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929); see also, *Evangelinos* v. *Trans World Airlines, Inc.,* —— F.2d —— (3d Cir. 1976), 14 Avi. (CCH) 17,101, 17,102.

What Judge Frankel's decision actually tells us is that the Warsaw Convention's delegates would have had no objection to a suggested interpretation of the Treaty which required the air carrier's own officers or employees, when sued individually for liabilities contemplated by the Convention, to dig into their own pockets to pay unlimited judgments rendered against them, as long as the corporate shell's liability had the benefit of the limitation contained in Article 22(1). Can anyone seriously believe that such a construction would have received a minute of approving thought or a single vote? Yet we are told that such was in effect the meaning of this Treaty. Cf. *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 472 (1892).

POINT II

The national policy expressed in a treaty permitting a limitation of liability is superior to any inconsistent common law rule. Any questions concerning the wisdom or fairness of the limitation are the exclusive perogative of the Executive Branch not the Judiciary.

A.

The court below wrongly invaded the province of the Executive Branch of the federal government when it held that the policy of limitation of liability expressed in the Treaty was insufficient to overcome what in its view was the preferred ("powerful") national policy against "stipulations by common carriers 'without congressional authority . . . against their own negligence or that of their agents or servants.' " (A 289).

What the court overlooked is that the policy of limited liability expressed in the Treaty *is* the policy of the United States. As such, it is the supreme Law of the Land ". . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article VI. This was affirmed as early as 1796 by the Supreme Court in *Ware* v. *Hylton,* 3 Dall. (3 U.S.) 199 wherein Justice Chase said (236-237):

> "A treaty cannot be the *Supreme law* of the land, that is of all the *United States,* if any act of a *State Legislature* can stand in its way. If the constitution of a State . . . must give way to a treaty, and fall before it; can it be questioned, whether the *less* power, an act of the state legislature, must not be prostrate? It is the declared will of *the people* of the *United States* that every treaty made, by the authority of the *United States* shall be superior to the *Constitution* and *laws* of any *individual State;* and their will alone is to decide." [Emphasis by Court.]

In *Hauenstein* v. *Lynham,* 100 U.S. 483, 489-490 (1880) the Court said:

> "It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national policy."

See, also, *Kolovrat* v. *Oregon,* 366 U.S. 187, 197-198 (1961). Therefore, any so-called national policy against a common carrier limiting its liability in negligence for personal injuries, no matter how "powerful", must be subordinate to the superior policy embedded in a treaty which allows such a limitation.

In attempting to justify his rejection of defendants' argument that the policy in the Treaty was superior to any inconsistent policy of the common law, Judge Frankel said that the Treaty's "original policy has lost a great deal of persuasive force: air travel is no longer an infant industry" (A 289). The simple answer to this is that he is constitutionally incompetent to make such a determination. Under our form of Government the President of the United States is the only one vested with this power. Article II, Section 2, Cl. 2, U.S. Constitution states: "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." The Supreme Court has said in connection with this power, *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 319 (1936) that:

> "He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and the Congress itself is powerless to invade it."

There is no doubt that the Executive has the superior resources to make such determinations, resources which are not available to the Judiciary. All these give the Executive a position of decided advantage. See, H. J.

Friendly, *"The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't"*, 63 Colum. L. Rev. 787, 791 (1963).

What is that "original policy" which the lower court claims lost a great deal of its persuasive force? That can be seen clearly in the report of Secretary of State Hull which accompanied President Roosevelt's letter of transmission of the Convention to the Senate for its Advice and Consent. *Sen. Exec. Doc. No. G., 73rd Cong., 2d Sess. 3-4* (1934); see, also, 1934 U.S. Aviation Reports 239-244. The Secretary of State said:

> "It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers *as affording a more definite basis of recovery* and as tending to lessen litigation, but that *it will prove to be an aid in the development of international air transportation.*"
>
> * * *
>
> "The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations compromises were undoubtedly necessary. On the whole, it is believed that the Convention adopted should be regarded as acceptable as a basis for regulating international transportation of passengers, baggage, and goods, and that any apparent departures from accepted procedure in this country are not sufficiently serious to warrant a withholding of adherence to the Convention."

It was further observed that adherence to the Convention would alleviate the "chaotic conditions which now confront American international air-transport operators and the public with respect to matters coming within the purview of the Convention."

This Treaty has not dried up and blown away since that policy was established. The Treaty is ongoing as evidenced by the continuous increase in the number of its adherent nations; see, Point I, *supra,* p. 10, footnote. The Warsaw Convention is "by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties . . ." Lowenfeld, *Aviation Law,* § 4.1 (1972). Debates concerning the revision of the Convention began almost as soon as it came into effect. *Id.* See, also, Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967), for a detailed account of the United States' activities concerning this Treaty from the time of its inception up to the time the United States withdrew its denunciation of the Treaty in 1966. Because the Montreal Agreement (Add. 21) is only an *interim* arrangement the process of revision and improvement of the Convention continues with the proposed *Guatemala City Protocol* of 1971 and its higher limits. See, Point I, *supra,* p. 11, footnote.

Judge Frankel's view concerning the protection of an "infant industry" (a most abused term) assumes that that was the only purpose of the treaty or its limitation. "Infancy" is a relative term. The fact that the aviation industry *in the United States* may no longer be in its infancy has little bearing on the rest of the world or the basic purpose of the Treaty. There is more to it than that. In its official notification of withdrawal of the denunciation, the State Department observed that because the conditions which led the United States to serve its notice of denunciation of November 15, 1965 substantially changed (limits were increased with *absolute liability*):

> ". . . the United states of America believes that its *continuing* objectives of . . . adequate protection for international air travelers will best be assured *within the framework of the Warsaw Convention.*" [Emphasis added]

54 *Dept. of State Bull.* 955-957 (1966); see, *Day* v. *Trans World Airlines, Inc., supra,* at 36-37:

> "It cannot be doubted, therefore, that the Warsaw Convention *now* functions to protect the passenger from *the many present-day hazards of air travel,* . . . This is amply demonstrated by the imposition of absolute liability and the establishment of *greatly increased* limits of liability. . . ."
>
> "We conclude, in sum, that the protection of the passenger ranks high among the goals which the Warsaw signatories *now* look to the Convention to serve." (Emphasis added.)

In his opening statement on behalf of the United States Delegation, ICAO, *Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and The Hague Protocol,* ICAO Doc. 8584-LC/154—1 & 2 (1966) (hereafter *Montreal Proceedings*), Mr. Lowenfeld explained the position of the United States with respect to its denunciation of the Convention, 2 *Montreal Proceedings* 174. He acknowledged that today international aviation is big business: "We are over the infant industry stage." As to the question of why there are limits of liability, Mr. Lowenfeld acknowledged that the question was not easy to answer particularly since American law for the most part granted the greater part of the Convention's advantages without a convention. He then explained the United States' position:

> "For the United States, then, the question comes down essentially to a balance of interests. Among these interests, *a heavy one is the co-operation and understanding of our friends around the world* in the international aviation and international law fields. We hope in the days ahead to be able to share with you all the results of our thorough, and I think you will find careful, studies. If on the basis of our joint discussions we can arrive at common conclusions, *it ought to be*

possible to arrive at a consensus on a revision—and therefore preservation—of the Warsaw Convention. We hope very much that this will be the case." (Emphasis added.)

It will be seen, therefore, that it is *still* the policy of the United States, as determined by the Executive Branch of our Government, to preserve the Warsaw Convention *with its limits,* even though it is acknowledged by our State Department that international aviation is big business and that we are "over the infant industry stage." And, as noted earlier, the Executive Branch is currently considering the *Guatemala City Protocol* which, if the Supplementary Compensation Plan is accepted, will increase the limits to approximately $320,000.00. Additionally, it is noted that in enacting reform, the Executive is entitled to proceed, as does the Legislature, "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Opt. Co.,* 348 U.S. 483, 489 (1955); *Silver* v. *Silver,* 280 U.S. 117, 123 (1929).

It is true of course, as this Court pointed out in *Day,* 528 F.2d at 36, that the Warsaw limitations have been the subject of much criticism.* The objections have fixed primarily on the low amount of the limitation. However, limitations of liability provisions are no novelty in this country. For example, in the federal area the maritime

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* While most of the criticism is in a serious vein some of it has been quite hysterical. See, e.g., Record on Appeal, Doc. 15, pp. 9-10 wherein plaintiffs' counsel claims that the President's failure to submit proposed amendments to the Convention to the Senate is due to "the excesses of Watergate" and his refusal to comply with "existing laws". In *Burdell* v. *Canadian Pacific Airlines,* 11 Avi. (CCH) 17,351 (Circuit Court, Cook County, Illinois, Case No. 66 L 10799) the plaintiff's attorney, in a 146 page printed *Reply* brief, inquired on page 20 whether the Court (Bua, J.) would sit powerlessly by and permit a flagrant denial of due process if Article 28 of the Convention required his suit to be brought in Warsaw, Poland, which is "now a Communist State".

industry (no longer an infant) has its limitation, 46 U.S.C. §§ 182, 183. See, Mendelsohn *The Public Interest and Private International Maritime Law,* 10 Wm. & Mary L. Rev. 783, 789-791 (1969). In the state area, wrongful death statutes, guests statutes and workmen's compensation law are some examples. It is true that wrongful death limits have been abolished, as of 1975, in all but two States. But this action was taken by legislatures—not the judiciary. However, see New York's recent no-fault automobile accident compensation law, Insurance Law, § 670 et seq. (1974) (approximately 23 other states have enacted similar legislation in the past several years). The Warsaw Convention does not, therefore, impose any conditions foreign to our jurisprudence.

One might reasonably inquire whether the United States *should* continue its adherence to this Treaty or whether the limits should be higher or abolished altogether. The answer to that question obviously rests with the Executive. Whatever balance is struck with respect to the limitation is not open to judicial scrutiny, *Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, 267 (1975). The question might be put: Where shall the line be drawn as to the amount of the limitation? Or, how much is enough? It can be conceded that every line drawn by a legislative body leaves out some that might well have been included. "That exercise of discretion, however, is a legislative, not a judicial, function." *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 8 (1974). And neither the wisdom of such determination, nor the propriety or even correctness of the Executive's response is within the judiciary's province to determine. *James* v. *Strange,* 407 U.S. 128, 133 (1972). Speaking of the legislative action, the Supreme Court, in *Chicago, Burlington & Quincy R.R. Co.* v. *McGuire,* 219 U.S. 549, 569 (1911), said:

> "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the

best means to achieve desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, *and the earnest conflict of serious opinion* does not suffice to bring them within the range of judicial cognizance." (Emphasis added.)

There is generally a very strong presumption that the legislative body has investigated and found the existence of a situation showing or indicating the need for or desirability of the legislation. See, *Matter of Taylor* v. *Sise*, 33 N.Y.2d 357, 364 (1974). Even where the question of what the facts establish is a fairly-debatable one, the courts accept and carry into effect the opinion of the legislature. *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183, 196 (1936). Judge Frankel's easy notion that "the original policy has lost a great deal of its persuasive force" is, therefore, not only inaccurate but it is also beyond the scope of his judicial competence to determine.

B.

In the lower court, plaintiffs' counsel stressed at some length that the Warsaw Convention's limits, as amended by the Montreal Agreement, were woefully inadequate and unfair (A244-251); and that the Treaty is contrary to "American Law" and "violative" of American public policy (A 251). Plaintiffs, however, do *not* make any claim that the Treaty or any part of it is unconstitutional. Plaintiffs stress the common law rule against common carriers limiting their liability in negligence for personal injuries. Judge Frankel preferred this "powerful national policy" over the policy expressed in the Treaty (A 289). As shown in Part A of this Point, *supra*, the policy of the Treaty is controlling. What plaintiffs and the lower court are basically saying is that although it is not claimed the Treaty is unconstitutional, its limits are nevertheless unfair and in derogation of the common law rule since the policy

of the Treaty limiting recovery is no longer valid, the rule of the common law must prevail.

This argument assumes that plaintiffs have a vested right that this rule shall remain unchanged. This is certainly not the law and never was. In *Munn* v. *Illinois,* 94 U.S. 113, 134 (1876) the Supreme Court said:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of common law as they are developed, and to adapt it to the changes of time and circumstances."

In *Arizona Employers' Liab. Cases,* 250 U.S. 400, 421 (1919) the Supreme Court repeated those principles in the following language:

> "But [common-law tort rules] are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee *in the absence of legislation.* They are not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare". (Emphasis by court.)

The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain permissible legislative object, *Silver* v. *Silver,* 280 U.S. 117, 122 (1929). The New York State

Constitution, Article 1, Section 14, expressly recognizes the power of the Legislature to alter the common law. In adopting the common law in effect on April 19, 1775 that provision goes on to add explicitly, "subject to such alterations as the legislature shall make concerning the same." Many states have *abolished* common-law causes of action by statute without providing any substitute remedy at all. See, e.g., *Langdon* v. *Sayre,* 74 Cal.App.2d 41, 168 P.2d 57; *Thibault* v. *Lalumiere,* 318 Mass. 72, 60 N.E.2d 349; *Hanfgarn* v. *Mark,* 274 N.Y. 22, remittitur amd., 274 N.Y. 570, app. dsmd., 302 U.S. 641; *Pennington* v. *Stewart,* 212 Ind. 553, 10 N.E.2d 619.

Plaintiffs here are far from being deprived of their cause of action. Rather than depriving them of the legal protection the Treaty has simply altered the remedy available for the claimed injury. Ample demonstration of this is the imposition of absolute liability and the establishment of greatly increased limits of liability. See, *Day* v. *Trans World Airlines, Inc., supra,* at 37. It would be immaterial that a particular claimant might have fared significantly better under the common law rule or a different treaty. Justice Cardozo said in *Anderson* v. *Wilson,* 289 U.S. 20, 27 (1933):

> "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it."

As Mr. Lowenfeld observed in his opening statement at the Montreal Conference, 2 *Montreal Proceedings* 174:

> "Let me say that the United States agrees with the observation of [The President of the Council of ICAO] this morning that the Warsaw Convention was *an excellent compromise* between the world's various legal systems." (Emphasis added.)

Considering the relative importance of the weight to be accorded to the views of the Executive Branch the courts

should proceed with caution in interpreting international agreements, to make sure that they have as complete a realization as possible of the implications of their decisions, both internationally and nationally. See, *Eck* v. *United Arab Airlines,* 360 F.2d 804, 812 n. 18 (2d Cir. 1966).

CONCLUSION

For all the above reasons, the order of the district court should be reversed and this cause remanded for further proceedings.

Respectfully submitted,

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ADDENDUM

The Warsaw Convention.*

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

THE PRESIDENT OF THE GERMAN REICH, THE FEDERAL PRESIDENT OF THE REPUBLIC OF AUSTRIA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE UNITED STATES OF BRAZIL, HIS MAJESTY THE KING OF THE BULGARIANS, THE PRESIDENT OF THE NATIONALIST GOVERNMENT OF CHINA, HIS MAJESTY THE KING OF DENMARK AND ICELAND, HIS MAJESTY THE KING OF EGYPT, HIS MAJESTY THE KING OF SPAIN, THE CHIEF OF STATE OF THE REPUBLIC OF ESTONIA, THE PRESIDENT OF THE REPUBLIC OF FINLAND, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND, AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MOST SERENE HIGHNESS THE REGENT OF THE KINGDOM OF HUNGARY, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF LATVIA, HER ROYAL HIGHNESS THE GRAND DUTCHESS OF LUXEMBURG, THE PRESIDENT OF THE UNITED MEXICAN STATES, HIS MAJESTY THE KING OF NORWAY, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE REPUBLIC OF POLAND, HIS MAJESTY THE KING OF RUMANIA, HIS MAJESTY THE KING OF SWEDEN, THE SWISS FEDERAL COUNCIL, THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC, THE CENTRAL EXECUTIVE COMMITTEE OF THE UNION OF SOVIET SOCIALIST REPUBLICS, THE PRESIDENT OF THE UNITED STATES OF VENEZUELA, HIS MAJESTY THE KING OF YUGOSLAVIA:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation

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* 49 Stat. 3000; T.S. 876; 137 LNTS 11.

by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

Chapter I. Scope—Definitions

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether

it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

Chapter II. Transportation Documents

Section I.—Passenger Ticket

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III.—AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22 (2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

The Warsaw Convention.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery

from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

The Warsaw Convention.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to inquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to,

any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transporation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

The Warsaw Convention.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevetheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. these sums may be converted into any national currency in round figures.

The Warsaw Convention.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie*

evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

The Warsaw Convention.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

The Warsaw Convention.

Chapter IV. Provisions Relating to Combined Transportation

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the documet of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

The Warsaw Convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory

subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

Additional Protocol
With Reference to Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.

Excerpts From The Hague Protocol.*

PROTOCOL TO AMEND THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR, SIGNED AT WARSAW ON 12 OCTOBER 1929

The GOVERNMENT UNDERSIGNED

CONSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929,

HAVE AGREED as follows:

CHAPTER I

AMENDMENTS TO THE CONVENTION

* * *

Article XIV

After Article 25 of the Convention, the following article shall be inserted—

"*Article 25A*

1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage

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* 478 UNTS 371.

resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

* * *

Montreal Agreement

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL[1]

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

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[1] Agreement CAB 18990, approved by order E-28680, May 13, 1966 (docket 17825).

Montreal Agreement.

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER
ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty

known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

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Add 25

Excerpts From Guatemala City Protocol.

PROTOCOL TO AMEND THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW ON 12 OCTOBER 1929 AS AMENDED BY THE PROTOCOL DONE AT THE HAGUE ON 28 SEPTEMBER 1955

The GOVERNMENTS UNDERSIGNED

CONSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955,

HAVE AGREED as follows:

CHAPTER I

AMENDMENTS TO THE CONVENTION

* * *

Article VIII

Article 22 of the Convention shall be deleted and replaced by the following:—

"Article 22

1. a) In the carriage of persons the liability of the carrier is limited to the sum of one million five hundred thousand francs for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed one million five hundred thousand francs."

* * *

Excerpts From Guatemala City Protocol.

Article XI

In Article 25 A of the Convention—

paragraphs 1 and 3 shall be deleted and replaced by the following:

"1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under this Convention.

3. The provisions of paragraphs 1 and 2 of this Article shall not apply to the carriage of cargo if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

* * *

Article XIV

After Article 35 of the Convention, the following Article shall be inserted:—

"Article 35 A

No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfil the following conditions:

a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that

State contributions from passengers if required so to do;

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system."

* * *

(30161)

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 7TH day of AUGUST 1976

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Attorneys for APPELLEES